$15

ROBERT M. SCHWARTZ

the FMLA handbook

A UNION GUIDE TO THE FAMILY & MEDICAL LEAVE ACT

Third Edition

COMPLETELY REVISED AND UPDATED

The FMLA Handbook

ROBERT M. SCHWARTZ

the FMLA handbook

A UNION GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT

Third Edition

Drawings by Nick Thorkelson

work rights press

CAMBRIDGE, MASSACHUSETTS

TABLE OF CONTENTS

INTRODUCTION 9

1. **FMLA SNAPSHOT** 13

2. **EMPLOYER COVERAGE** 18
Private Sector • Public Sector

3. **EMPLOYEE ELIGIBILITY** 20
Months of Service • Work Hours • Worksite Size

4. **FMLA LEAVE YEAR** 29
Calendar Year • Fixed Year • 12 Months Measured Forward • 12 Months Rolling Backward

5. **MEDICAL LEAVE** 33
Basic Rights • Serious Health Condition • Intermittent Leave • Reduced Schedule • Alternative Position • Certification • Recertification • Appointments

6. **FAMILY-CARE LEAVE** 58
Family Members • Serious Health Condition • Care • Certification • Intermittent and Reduced-Schedule Leave

7. **NEW-CHILD LEAVE** 70
Birth Parents • Adoptive Parents • Foster Parents

8. **HEALTH BENEFITS** 75
Employee Contribution • Point of No Return

9. **EMPLOYEE DUTIES** 80
Notice • Company Rules

10. **EMPLOYER DUTIES** 88
Poster • Descriptions • Answer Questions • Ineligibility Notice • Rights-and-Responsibilities Notice • Designation Notice • Recordkeeping

11. **LIGHT DUTY** 98
A Leave is a Leave

12. **PAID LEAVE** 101
Employee Rights • Employer Rights

13. **JOB RESTORATION** 108
Fitness Report • CBA Rules • Same or Equivalent Position • No Reprisals

14. **GRIEVANCES** 118
Attendance Cases • Pretext Cases • Vacation Substitution • Other Cases

15. **COMPLAINTS AND LAWSUITS** 129
DOL Complaints • Lawsuits

16. **BARGAINING** 136
Incorporating the Act • Procedures • Protections • Mid-Term Changes

17. **SPECIAL RULES FOR TEACHERS** 142
End-of-Term Leave • Intermittent Leave

APPENDIX A: *State Leave Laws* 146
APPENDIX B: *Wage And Hour District Offices* 153
APPENDIX C: *DOL Poster* 159
APPENDIX D: *DOL Certification Form* 160
APPENDIX E: *DOL Rights-and-Responsibilities Notice* 164
NOTES 166
INDEX 183

INTRODUCTION

THIS BOOK EXPLAINS the Family and Medical Leave Act (FMLA) and suggests ways to use it, especially in union-organized workplaces.

Congress enacted the FMLA in 1993 after years of efforts by women's groups, senior citizen's organizations, and labor unions. It is one of the nation's most innovative labor laws.

To a significant extent, the FMLA allows eligible employees to balance the demands of the workplace with the needs of their families and their own health. A mother can stay home with a seriously ill child. A worker with a chronic health condition can miss work intermittently. Mothers and fathers can take leaves to care for newborn children. Sons and daughters can aid their parents.

Union law. During the FMLA hearings, compelling testimony for a national leave law came from nonunion workers, including parents who lost jobs when their children contracted fatal disorders. It should come as no surprise, however, that the Act has had a markedly lesser impact on unorganized workers. Nonunion employers frequently deny promotions, withhold pay increases, and threaten workers who ask for FMLA leaves. Employees can complain to the U.S. Department of Labor (DOL) or sue in court, but this entails a level of confrontation usually unthinkable without a union.

In organized workplaces employees can assert their rights without fear of retaliation and can file grievances against violations. If the employer persists, the union can take the matter to arbitration, help the worker to sue, or take other action.

Business impact. Predictions by some that the FMLA would lead to an epidemic of absenteeism have proven to be exaggerated. The Act applies to serious health conditions, not minor ailments. Employers can insist on documentation and schedule second-opinion examinations. In a DOL survey, more than 80 percent of employers reported that the FMLA was having either a positive effect on productivity, profitability, and growth or no noticeable effect at all.

DOL regulations. Congress instructed the Secretary of Labor to write regulations to define key terms in the FMLA and establish leave-taking procedures. Issued in 1995, the DOL regulations are a primary source of FMLA authority. When arguing a matter with a supervisor or manager, a good technique is to present a copy of the applicable regulation. Enter the regulation number into an internet search engine such as Google or Yahoo (no need for the § mark), and print the first response.

Thank you. This edition of *The FMLA Handbook* discusses several new topics. Some new issues surfaced in litigation; others were suggested by union activists. I thank everyone whose queries and comments have helped to make this a better book.

Robert M. Schwartz
Boston, Massachusetts
October 2006

The author can be reached at robertmschwartz@comcast.net.

1. FMLA SNAPSHOT

AFTER EIGHT YEARS of debate, thirteen votes, and two presidential vetoes, Congress adopted the Family and Medical Leave Act on February 4, 1993. President Bill Clinton signed the bill the following day. The FMLA allows eligible employees to take up to 12 workweeks of unpaid leave each year for medical or family reasons.

The FMLA covers:

- Private-sector employers with 50 or more employees
- Public-sector employers, including federal, state, and local government agencies and schools

You are eligible for FMLA leave if you:

- Work for a covered employer, and
- Have worked for this employer for at least 12 months, and
- Have worked at least 1,250 hours during the 12 months before the start of your leave, and

- Work at a location where your employer employs 50 or more employees within a 75-mile radius.

As an eligible employee, you may take up to 12 workweeks of job-protected leave in a 12-month period to:

- Treat or recover from a serious health condition that makes you unable to perform your job (medical leave)
- Care for a child, spouse, or parent suffering from a serious health condition (family-care leave)
- Care for or bond with a newborn, newly adopted, or new foster child (new-child leave)

Serious health conditions include injuries or illnesses that involve medical treatment and incapacitate you or a family member for more than three consecutive calendar days. The FMLA also covers disabilities resulting from chronic ailments or pregnancy. The FMLA does not apply to colds, ear infections, upset stomachs, or other minor health conditions.

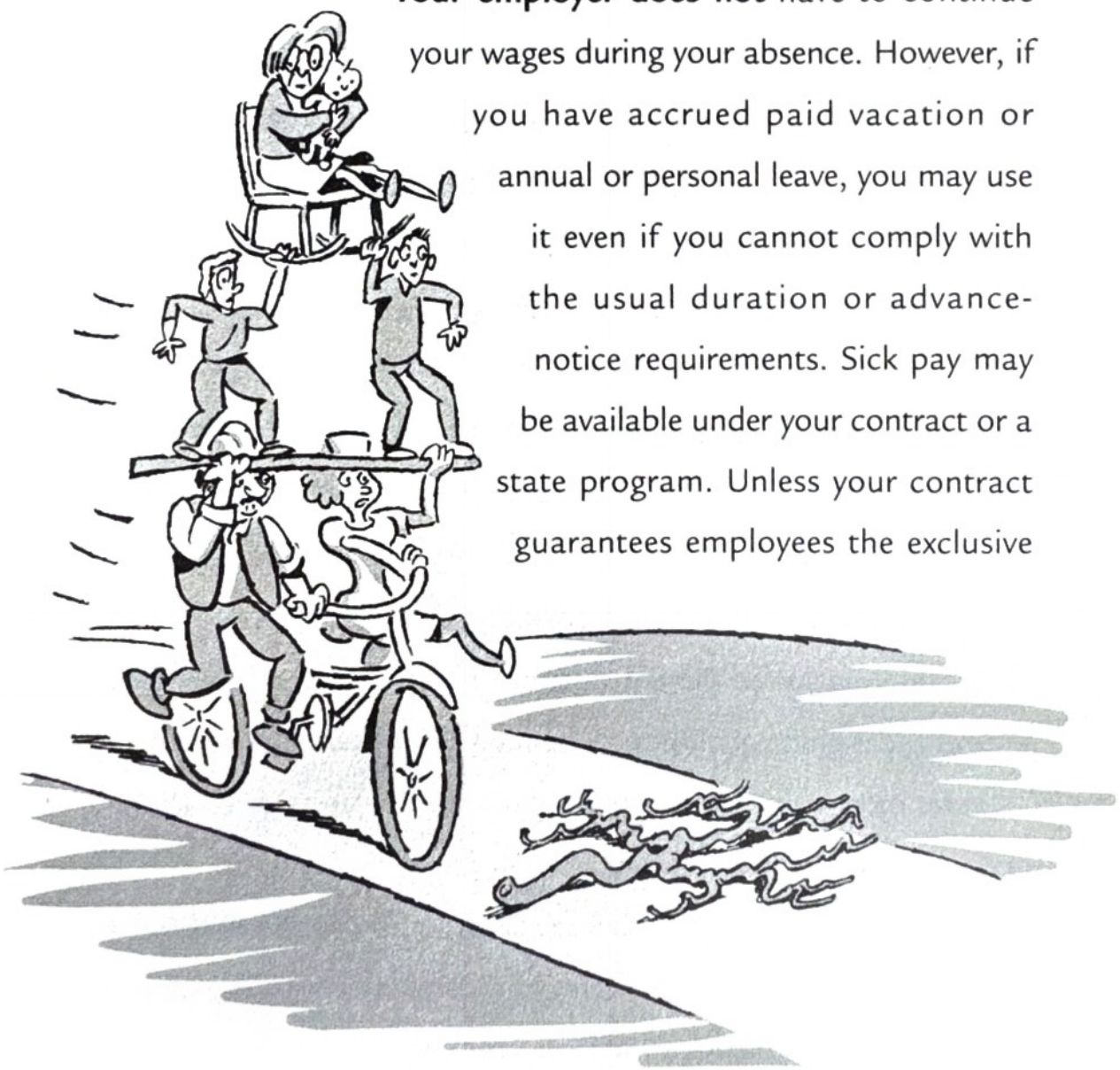
When medically necessary, you may take time off intermittently or by reducing your scheduled days or hours.

Your employer may not deny you time off because of production needs or because you occupy an important position.

During your leave, your employer must maintain your group health plan benefits as if you were working.

Your employer may request a certification prepared by a health care provider verifying that your leave is for a purpose recognized by the FMLA. Before returning from a medical leave, you may be required to submit a fitness-for-duty report.

Your employer does not have to continue your wages during your absence. However, if you have accrued paid vacation or annual or personal leave, you may use it even if you cannot comply with the usual duration or advance-notice requirements. Sick pay may be available under your contract or a state program. Unless your contract guarantees employees the exclusive



right to schedule vacations, your employer may be able to force you to use your vacation leave.

You may not be warned, suspended, or discharged for taking FMLA time off. Nor may your employer issue you an adverse evaluation, deny you a promotion, count your absences under an attendance control policy, or take other action against you.

If your need for time off is foreseeable 30 days in advance—for example, if your doctor schedules you for an operation—you must give notice at least 30 days in advance. If you have less than 30 days foreknowledge, you must notify your employer as soon as practicable. The notice may be verbal.

When your leave is completed, your employer must restore you to your regular job or to an equivalent position with the same pay, benefits, duties, status, terms, and conditions of employment.

Your employer must post a notice explaining the FMLA, include FMLA information in benefit documents, answer questions, and promptly designate qualifying absences as FMLA leave.

Under most union contracts FMLA rights can be asserted in the grievance procedure.

The U.S. Department of Labor (DOL) enforces the FMLA. In the event of a violation, you can file a complaint with the Wage and Hour Division. You may also sue your employer in court.

Your employer violates the FMLA if a manager or supervisor:

- Refuses to allow you a qualifying leave
- Orders you to cut short your leave or report for light duty
- Fails to restore you to your former position or its equivalent
- Withholds a benefit or privilege because you have taken FMLA leave
- Uses coercion, threats, or intimidation to discourage you from exercising FMLA rights
- Gives you a poor evaluation or denies you a promotion because you have taken FMLA leave
- Fires, disciplines, or demotes you because of FMLA absences
- Punishes you for complaining about FMLA violations, telling others about the FMLA, or taking legal action
- Denies you any other rights provided by the FMLA or the regulations issued by the U.S. Department of Labor

2. EMPLOYER COVERAGE

- *Private Sector*
- *Public Sector*

THE FMLA IS A LAW OF BROAD APPLICATION. It covers all economic sectors, including manufacturing, services, transportation, health care, agriculture, mining, education, and government.[1]

PRIVATE SECTOR

An employer in the private sector comes under the FMLA if it employs 50 employees for 20 or more workweeks in either the current or the preceding calendar year.[2] The weeks need not be continuous.

Example: Amy Stone, an employee of Triplex Foods, asked for family-care leave on November 1, 2006. During the previous

months of 2006, 52 persons worked for periods of 20 weeks or longer. Triplex is covered by the FMLA for 2006 and 2007.

When counting employees, the FMLA includes managers, supervisors, part-time employees, temporary employees, leased employees, and employees on leaves of absence. Laid-off employees, employees who work in foreign countries, and independent contractors are not included.

Territories. The FMLA applies in all U.S. territories and possessions, including Puerto Rico, Guam, and the Virgin Islands.

PUBLIC SECTOR

The FMLA covers all federal, state, and local government agencies, including school systems, without regard to the number of persons employed. Leave-takers must, however, meet the 50-employees-within-75-miles requirement described on pages 23–24.

3. EMPLOYEE ELIGIBILITY

- *Months of Service*
- *Work Hours*
- *Worksite Size*

AS THE FMLA MOVED TOWARD passage, business interests lobbied lawmakers to exclude short- and part-time employees and employees at isolated worksites. Congress cooperated by imposing three eligibility tests.

To qualify for FMLA leave, an employee must:

- Have been employed by a covered employer for at least 12 months, and
- Have worked for this employer at least 1,250 hours during the

12-month period immediately preceding the date leave is taken, and

- Work at a location where the employer employs at least 50 employees within 75 miles.

MONTHS OF SERVICE

The FMLA excludes short-term workers by insisting on at least 12 months of service (52 weeks) as of the date a leave is due to commence. The months or weeks do not have to immediately precede the leave. Nor must they be consecutive.[3] Periods when an employee was sick, disabled, on vacation, or on leave are counted if the employer provided compensation or benefits. Work for a temporary agency prior to hire counts.[4] An employee who leaves work for military service is given credit for duty time.

WORK HOURS

An employee must work at least 1,250 hours during the 12 months preceding the start of an FMLA leave. Overtime hours count. Holiday, vacation, sick, compensatory, and other nonworking time, whether paid or not, does not count. An employee whose hours are not recorded—for example, an engineer—is presumed to have worked 1,250 hours unless the employer can clearly prove otherwise.

Union time. Grievance processing and other union time is credited toward the 1,250-hour requirement if the employer pays for the time or counts it when computing overtime pay. Time paid for by the union does not count.

Military service. Employees who are rehired after a military leave, including service in the reserves or the National Guard, are credited with the hours they would have accumulated had they stayed on the job.[5]

Unintended exclusion. Although aimed at part-time and seasonal employees, the 1,250-hour test can disqualify a fulltimer who misses work for an extended period.

> **Example:** Cindy Harris worked full time for Motorola for 10 years. On February 1, 2006, she incurred a severe back injury and was out of work for seven months. When she returned on September 1, she only had 800 hours "in the bank" (from her five months of service before her injury). Harris must work 450 additional hours to restore her FMLA eligibility.

Intermittent leave. A worker who has 1,250 hours "in the bank" when a leave is taken may not have 1,250 hours later in the leave year. This will prevent the worker from taking time off for other conditions, but not for a condition for which eligibility has been established.[6]

> **Example:** Bill Rice works for a company that uses the calendar-year leave method. On February 1, 2005, his company approved

him for a two-week FMLA leave to care for a daughter with a severe emotional condition. On May 1, 2005, the company laid him off for six months. When he returned on November 1, he only had 900 hours in the bank. For the remainder of the year he was able to take further leaves to care for his daughter but for no other FMLA purpose. After January 1, 2006 he had to re-qualify under the 1,250-hour test.

Note: If Rice's employer used the rolling-backward leave-year method (see next chapter), Rice would have been able to take leave for his daughter's condition until February 1, 2006, whatever his hours in the bank.[7]

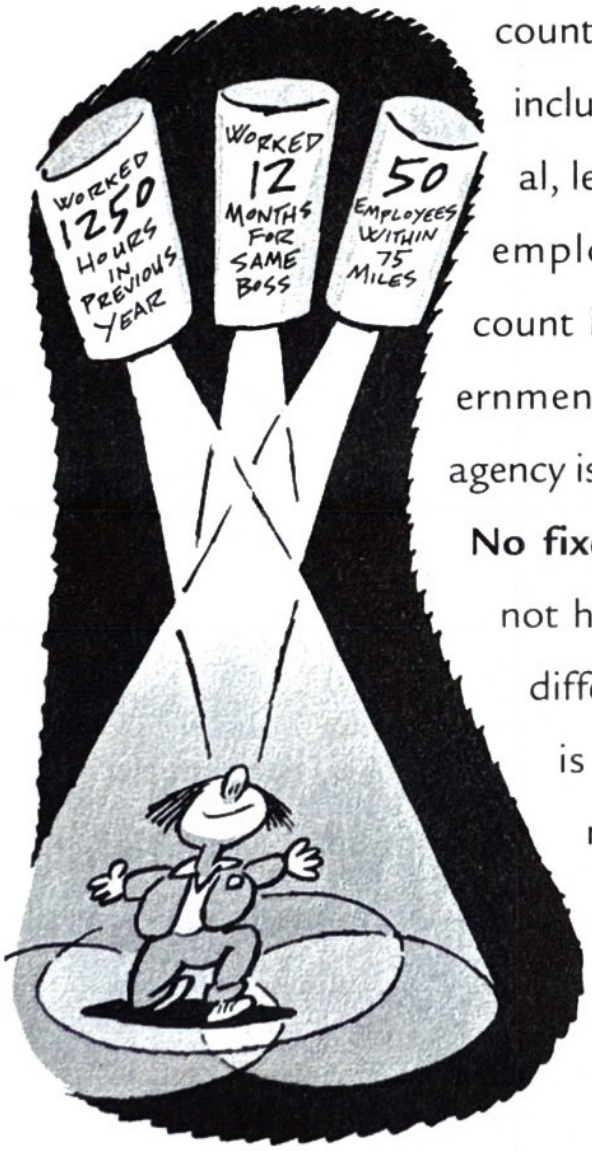
Notification of insufficient hours. If an employee requests FMLA time off, or is absent for an FMLA reason, but does not have 12 months or 1,250 hours of service, the employer is expected to notify the employee and explain the date eligibility is projected to accrue. An employer that fails to meet this responsibility may have to treat the employee as FMLA-eligible.[8] See page 90.

WORKSITE SIZE

On the day an employee makes an FMLA request, the number of persons on the payroll where he or she is employed, or within a 75-mile radius, must be 50 or more.[9] By excluding small worksites, Congress intended to exempt locations where obtaining replacements for absent workers may be difficult.

The 75-mile rule can disqualify the entire workforce of a covered employer. For example, a restaurant chain may employ hundreds of workers. But if each restaurant is more than 75 miles apart, and each has less than 50 employees, none of the workforce will be FMLA-eligible.

Counting employees. Other than an owner or a partner, every person on the payroll when an employee requests FMLA leave counts toward the 75-mile requirement, including part-time, temporary, seasonal, leased, newly hired, and leave-taking employees. In the public sector, the count includes all employees of the government body of which the employee's agency is a part.



No fixed site. When an employee does not have a fixed worksite and travels to different work locations, the worksite is the employee's home base or, if none, the site from which the employee receives assignments or to which the employee reports. The worksite of employees who

work at home is the office from which they receive assignments and to which they report.[10]

Tip: If the number of employees at or near your worksite fluctuates above and below 50, wait to request FMLA time until a week when 50 employees are on the payroll. You will remain qualified even if the number drops below 50 when your leave commences.

Federal Employees

Special FMLA rules govern federal employees other than those working for the Postal Service. Among the differences:

- **Federal employees do not have to work 1,250 hours before taking time off.**
- **Federal employees do not have to work at sites having 50 employees within 75 miles.**
- **Federal agencies cannot force leave-takers to use accrued vacation or other paid leave.**
- **Federal agencies do not have to issue FMLA designation notices.**
- **Highly compensated employees have the same reinstatement rights as other employees.**
- **An employee who fails to return from FMLA leave does not have to reimburse the government for health insurance contributions made on his or her behalf during the leave.**

The U.S. Office of Personnel Management (OPM) has issued regulations applying the FMLA to federal workers.[11]

QUESTIONS AND ANSWERS

Professor

Q. Are college professors who teach 12 hours a week excluded from the FMLA?

A. No. The FMLA presumes that full-time professors, teachers, and other academic instructors meet the 1,250-hour test unless the college or school can prove that the total number of hours worked – including preparation time, meetings, and research – is less than 1,250.[12]

Almost there

Q. An employee with 51 weeks of service was badly injured in a car accident. He has one week of accrued vacation time. Could he take his vacation, satisfy the 12-month test, and qualify for FMLA protection?

A. The regulations do not address this scenario but in one case a federal judge counted a paid vacation taken at the end of an employee's first year.[13]

Contract worker

Q. I work for a computer company on one-year contracts. The company calls me an independent contractor. If I miss work because of FMLA reasons, do I have any protection?

A. Bona fide independent contractors are not covered by the FMLA. But employers sometimes misclassify. You may be an FMLA-eligible employee if:

- You work exclusively for the company, and
- You are not in business for yourself, and
- Management closely supervises your work.[14]

Temp agency

Q. I work for an agency that provides temporary employees for nursing homes. I have been at my current location for three months. If I take time off to care for my father, can the agency cut me loose?

A. Not necessarily. You come under the FMLA if the temp agency has 50 employees, you have worked for it for 12 months, you worked 1,250 hours over the past year, and 50 employees of the agency and the nursing home work within 75 miles. In these circumstances, the agency must either return you to your original location or give you a new assignment.[15]

New owner

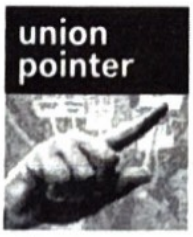
Q. Our company is in the process of being sold. The new owner says he will continue operations. Will we have to work 12 more months to be FMLA-eligible?

A. No. An owner that substantially continues prior operations is a "successor in interest" and must, for purposes of FMLA eligibility, recognize employees' prior service time.[16]

Reinstated worker

Q. We won an arbitration case for a worker who was discharged 14 months ago. The arbitrator reinstated her with full back pay. Will she need to work 1,250 hours to reestablish her FMLA eligibility?

A. The authorities disagree. The First Circuit Court of Appeals says a worker reinstated by an arbitrator must requalify.[17] The Sixth Circuit says that hours of service include those covered by a back-pay order.[18]



Some unions have won contract language expanding FMLA eligibility to all employees, regardless of months employed or hours worked. The union's argument is that this eliminates recordkeeping disputes and prevents morale problems that can arise when workers have different benefits. See page 140 for a sample contract clause.

4. FMLA LEAVE YEAR

- *Calendar Year*
- *Fixed Year*
- *12 Months Measured Forward*
- *12 Months Rolling Backward*

THE FMLA REQUIRES EMPLOYERS to choose one of four methods for the 12-month period during which employees may take their 12 workweeks of FMLA leave. The allowable methods are:

- The calendar year
- Another fixed 12-month period
- The 12-month period measured forward from the date an employee first uses FMLA leave

- A rolling 12-month period measured backward from each date an employee uses FMLA leave

An employer must apply the same leave-year method to its entire workforce, even if it operates in several states or has multiple divisions.[19] It must give 60 days notice before changing methods. If the employer does not choose a method, or does not inform employees, a worker may select the method that offers him or her the most beneficial outcome.[20]

> **Example:** Louis Tang must miss work for six months (24 weeks) to have an operation and recover. Tang's employer has not chosen a leave year. Tang can secure FMLA protection for his absence by selecting a fixed year ending 12 weeks from his first day out.

CALENDAR YEAR

The calendar year is the most straightforward leave-year method. Under it, an employee may take 12 weeks of FMLA leave each year between January 1 and December 31.

> **Example:** In 2007, Carol Hart took three weeks of FMLA leave in January, one week in March, two weeks in June, three weeks in July, one week in October, and four days in December. Her total for the year was 10.8 workweeks. On January 1, 2008, she will receive a new 12-week entitlement.

FIXED YEAR

An employer may use a fixed year other than the calendar year. One possibility is the 12-month fiscal year. Another is each employee's anniversary year.

12 MONTHS MEASURED FORWARD

Under the measured-forward method, an employee's leave year begins the first time FMLA time is taken and expires 12 months thereafter. The next year begins the first instance that the employee again uses FMLA leave.

> **Example**: Carl Mink began his first FMLA leave on September 15, 2006. His leave year will run until September 14, 2007. His next leave year will begin the first day he uses FMLA leave after September 14, 2007.

12 MONTHS ROLLING BACKWARD

Under the rolling-backward method, the leave year is the 12-month period prior to each day an employee needs FMLA leave. When the employee makes a request, the employer must review time off during the preceding 12 months to see if any leave time remains. As each day of a leave continues, one day 365 days before is removed from the "look-back" period. If the eliminated day was an FMLA day, an additional day of entitlement becomes available.

Example: Helen Jaffe was on FMLA leave for 12 weeks from April 1 to June 30, 2006. Her company uses the rolling-backward method. Over the next nine months, she cannot take FMLA leave because her look-back period will encompass 12 weeks of leave. On April 1, 2007, she will be able to take one day of leave. On April 2, a second day, and so on.

Employer consultants urge the rolling-backward method because it is the only one that prevents a worker from "leave-stacking," taking 12 consecutive weeks at the end of one leave year and 12 more at the beginning of the next. The method is difficult to administer, hard for employees to understand, and leads to frequent disputes.